

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

November 14, 2002 Session

JOHN ROBERT REWCASTLE, JR., ET AL. v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission, Eastern Division
No. 20100578 Vance W. Cheek, Jr., Commissioner

FILED DECEMBER 31, 2002

No. E2002-00506-COA-R3-CV

The claimant, John Robert Rewcastle, Jr.,¹ was injured in a motorcycle accident on property owned by the State of Tennessee (“the State”). The claimant filed a claim against the State with the Tennessee Claims Commission (“the Claims Commission”), alleging that the State’s negligence was the proximate cause of his injuries.² The State answered, relying upon the affirmative defense of immunity from suit under Tenn. Code Ann. § 70-7-101, *et seq.* (1995) (“the Recreational Use Statutes”). The State filed a motion for summary judgment based upon this immunity. In opposing summary judgment, the claimant contended that the gross negligence exception to immunity found in the Recreational Use Statutes negates the State’s defense. The Claims Commission granted the State’s motion. The claimant appeals. We vacate the judgment of the Claims Commission and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Claims Commission
Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J. and HERSCHEL P. FRANKS, J., joined.

David L. Franklin, Chattanooga, Tennessee, for the appellants, John Robert Rewcastle, Jr., and Amy Naylor Rewcastle.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, and Laura T. Kidwell, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

¹Mr. Rewcastle’s wife is also a party to the instant claim. Her claims are derivative in nature. For ease of reference, we will limit our references to Mr. Rewcastle. We will refer to him as “the claimant.”

²The State has waived sovereign immunity, but only to the extent provided by statute. *See* Tenn. Code Ann. § 9-8-101 *et seq.* (1999 & Supp. 2002).

OPINION

I.

Since this appeal involves a grant of summary judgment, we are called upon to decide anew “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. In deciding this case, we “must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence.” *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn. 1993). “Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.” *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). Since a motion for summary judgment presents a pure question of law, our review is de novo with no presumption of correctness as to the trial court’s judgment. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 228 (Tenn. Ct. App. 2000).

II.

The material facts are essentially undisputed. Where there are different inferences to be drawn from these facts, we construe them in favor of the nonmoving party, *i.e.*, the claimant. *Byrd*, 847 S.W.2d at 210.

The accident occurred in the Reelfoot Lake Wildlife Management Area (“the Park”) in Lake County on September 9, 2000, at approximately 1:30 p.m. Before the accident, the claimant had been riding his dual sport motorcycle³ through the Park and an adjacent wildlife refuge for about two and a half hours. This is the first time the claimant had ridden his motorcycle in the Park. Just prior to the accident, the claimant was driving on a paved road in the Park. As he proceeded along this road, he came upon a number of side roads, each of which joined the main road at approximately a right angle. The claimant noticed the side roads, but he did not turn onto them because he saw that each was blocked by a gate two to three feet off the ground. Attached to each gate was a large sign advising that motorized vehicles were prohibited. When the claimant reached a side road that did not appear to be so restricted, he turned onto it. This road was Upper Gate Road. The roadbed was gravel and earth; it was not blocked by a gate.

Unbeknownst to the claimant and despite the absence of a gate, Upper Gate Road was also not open to motorized traffic. A series of signs along the side of the road were intended to serve as notice that motorized traffic was prohibited. The claimant did not see any of these signs. As the claimant continued along the side road, he noticed orange streamers on either side of the road. The claimant believed the streamers were meant to warn of an underground culvert. However, as he continued further, at about 20 to 25 miles per hour, he suddenly noticed that these flags were

³The claimant’s dual sport motorcycle resembles a “dirt bike.”

attached to a cable, *which was some 8 to 12 inches above the ground*, extending across the road. The cable was a rusty brown color that blended into the background. The claimant had only about a second to react to the presence of the cable. Unable to stop his motorcycle, the claimant struck the cable going about 20 miles per hour. The claimant was hurled forward. His left leg struck the cable and was almost severed. The cable then frayed and broke, after which it struck and sliced the claimant's foot.

As previously stated, the claimant asserts that he did not know that Upper Gate Road was closed to motorized traffic. The State argues that signs were in place informing the claimant that the road was closed to such traffic. In addition, the State asserts that its employees just that morning had attached streamers to the middle of the cable. The State contends that had the claimant taken heed of the signs, the accident would not have occurred.

The claimant responds that the signs were hidden, damaged, and/or insufficient to provide him with *any* notice that the road was closed. While the claimant has no direct evidence to dispute the State's proof that the streamers had been hung on the middle of the cable, he asserts that at the time of the accident, about four hours after the streamers were put in place, they were on the outer sides of the cable.

It is more than arguable that the signage along the side road was insufficient to advise one that the road was not to be used for motorized vehicles.⁴ All three signs read "No Motorized Vehicles Beyond This Point." The first sign was relatively legible, but was riddled with bullet holes and was very small, being only about two and a half inches wide by twelve inches high. It was affixed to a post on the side of the road. The claimant argues that an individual would not notice or be able to read the sign unless he or she was already aware of its existence. The second sign was identical to the first, and was nailed to a tree alongside the road. Though there was no damage to the sign, it was completely obscured by vines and weeds wrapped around the tree. The third was bigger and was also attached to a tree. However, this sign was also obscured by vines and, in addition, rust had covered the "No" in "No Motorized Vehicles," so that the sign read "Motorized Vehicles Beyond This Point." Although it was the practice of the State to maintain the visibility of the signs by spraying herbicides on the vines and weeds that wrapped around the trees, this apparently had not recently been done. While the State had a replacement sign available for the bullet-riddled sign, it had not been installed. Significantly, there was no sign warning of the cable.

The claimant argues that the State was on notice of the danger posed by the cable. Five or six years prior to the claimant's accident, another similar accident occurred on Upper Gate Road. A pickup truck ran into a cable strung in the same place as the one the claimant hit. The Park's staff was aware that this accident had occurred but took no steps to prevent such accidents beyond placing the streamers on the cable. The record contains no further information about this prior accident.

⁴The claimant presented evidence of these signs through an affidavit and attached exhibits. The affidavit does not state whether the order in which the signs are discussed is the order in which the claimant passed them as he rode down Upper Gate Road. Regardless, we will address them in the same order as the affidavit and refer to them by number.

III.

The essence of the Recreational Use Statutes can be found at Tenn. Code Ann. § 70-7-102. As pertinent to the facts of this case, that statute provides as follows:

The landowner,⁵...of such land or premises owes no duty of care to keep such land or premises safe for entry or use by others for such recreational activities as...*off-road vehicle riding*..., nor shall such landowner be required to give any warning of hazardous conditions, uses of, structures, or activities on such land or premises to any person entering on such land or premises for such purposes, except as provided in § 70-7-104.

(Emphasis added). § 70-7-104 provides, in pertinent part, as follows:

This chapter does not limit the liability which otherwise exists for:

(1) *Gross negligence, willful or wanton conduct which results in a failure to guard or warn against a dangerous condition, use, structure or activity;*

* * *

(Emphasis added).

The Recreational Use Statutes were examined by the Supreme Court in the case of ***Parent v. State***, 991 S.W.2d 240 (Tenn. 1999). In the course of its opinion, the Supreme Court described the function of The Recreational Use Statutes. The Recreational Use Statutes merely provide

an affirmative defense to other viable causes of action outside the [R]ecreational [U]se [S]tatute[s]. The exceptions in Tenn. Code Ann. § 70-7-104 do not create new causes of action. *See* Tenn. Code Ann. § 70-7-104 (“This chapter does not limit the liability which otherwise exists for....”). To adequately allege a claim, the [claimant is] not required to plead § 104 exceptions to the State’s immunity. Section 104 merely operates to: (1) negate the recreational use defense, and (2) allow a claimant to pursue a cause of action for which a recreational use defense has been raised.

Id. at 242-43. In the ***Parent*** case, the Supreme Court explained how the Recreational Use Statutes are to be applied:

⁵“‘Landowner’ includes any governmental entity.” Tenn. Code Ann. § 70-7-101(2)(B).

The recreational use defense requires a two-pronged analysis to determine whether the State is entitled to immunity. The inquiries are as follows: (1) whether the activity alleged is a recreational activity as defined by the statute; and if so, (2) whether any of the statutory exceptions or limitations to the immunity defense are applicable. If Tenn. Code Ann. § 70-7-102 is applicable and no exceptions apply, the State is immune. If Tenn. Code Ann. § 70-7-102 is applicable but an exception is also applicable, the State may be subject to liability.

Id. at 243.

IV.

In the instant case, the claimant was engaged in “off-road vehicle riding” on the State’s property. This activity is specifically identified in Tenn. Code Ann. § 70-7-102. Thus, the first inquiry under *Parent*, *i.e.*, “whether the activity alleged is a recreational activity as defined by the statute,” *id.*, is answered in the affirmative.

Moving to the second inquiry under *Parent*, *i.e.*, “whether any of the statutory exceptions or limitations to the immunity defense are applicable,” *id.*, we note that the only Tenn. Code Ann. § 70-7-104 exception relied upon by the claimant in the case at bar is that of “gross negligence.” As support for this contention, among other things, the claimant points to the fact that the State installed the cable that inflicted the claimant’s injury, failed to maintain signs on the property and knew that a similar accident had occurred at an earlier time. The claimant argues that these acts and omissions amount to grossly negligent behavior. Thus, so the argument goes, the State is not entitled to the immunity of the recreational use defense set forth in Tenn. Code Ann. § 70-7-101, *et seq.*

V.

The subject of gross negligence as an exception to the immunity granted by the Recreational Use Statutes has been addressed in at least two cases since the General Assembly amended Tenn. Code Ann. § 70-7-104(1) in 1987 to add the concept.⁶

In *Sumner v. United States*, 794 F. Supp. 1358 (M.D. Tenn. 1992), the plaintiff was injured by unexploded ordnance on a firing range on the military installation at Fort Campbell. *Id.* at 1361. Following a bench trial, the District Court explained that the Army knew that the range had to be

⁶The previous version of Tenn. Code Ann. § 70-7-104(1), enacted in 1963, did not use the “gross negligence” language among the exceptions to immunity. The previous subsection (1) of Tenn. Code Ann. § 70-7-104 provided as follows:

This Act does not limit the liability which otherwise exists
(1) For wilful [*sic*] or malicious failure to guard or warn against a dangerous condition, use, structure or activity;

Chapter 177, Public Acts of 1963.

kept clear of trespassers because it knew of the potential for injury resulting from unexploded ordnance; in other words, that the Army had created the hazard and knew that it had to keep trespassers off the range. *Id.* at 1362. In *Sumner*, the District Court held that a failure to maintain a clear legible sign warning of such a known danger under the facts of that case constituted gross negligence. *Id.* at 1367.

In *Bishop v. Beckner*, No. E2001-02627-COA-R3-CV, 2002 Tenn. App. LEXIS 678 (Tenn. Ct. App. E.S., filed Sept. 23, 2002) (*perm. app. filed* Nov. 19, 2002), a teenager was killed when he fell in a cave on the landowner's property. *Id.* at *1. In *Bishop*, the defendant had never gone beyond the entrance of the cave and had no knowledge of any kind regarding the dangers that existed in the cave. *Id.* at *15. The defendant made no effort to warn the public of any hidden dangers they could face on her property. *Id.* at *11. On appeal from a grant of summary judgment in the defendant's favor, we affirmed and held that the defendant could not be grossly negligent for failing to warn the public about dangerous conditions which she did not create and of which she was not aware. *Id.* at *14-*16.

VI.

The facts in the instant appeal are more analogous to *Sumner* than *Bishop*. As in the *Sumner* case, the State in the instant case created the hazardous condition that led to the plaintiff's injury. Like in *Sumner*, the State failed to maintain signs that could have prevented the accident. In addition, had the State installed a gate across Upper Gate Road as it did on the other side roads, the accident in all likelihood could have been avoided. Furthermore, because of the previous accident, the State knew that the low-to-the-ground cable posed a potential hazard to the public but took no action to install a more noticeable barrier.

Gross negligence is "a 'conscious neglect of duty or a callous indifference to consequences.'" *Conroy v. City of Dickson*, 49 S.W.3d 868, 871 (Tenn. Ct. App. 2001) (quoting *Thomason v. Wayne County*, 611 S.W.2d 585, 587 (Tenn. Ct. App. 1980)). As previously stated, if the State was guilty of gross negligence in connection with the claimant's injury, the Recreational Use Statutes do not shield it from liability. Gross negligence presents an issue of fact. See *Phelps v. Magnavox Co. of Tennessee*, 62 Tenn. App. 578, 589, 466 S.W.2d 226, 232 (1970). A question of fact must be reserved for trial unless the evidence contained in the record could only bring reasonable minds to reach one possible conclusion. See, e.g., *Staples*, 15 S.W.3d at 89; *Davis v. Campbell*, 48 S.W.3d 741, 747 (Tenn. Ct. App. 2001).

We hold that reasonable individuals could reach different conclusions as to whether the State was guilty of gross negligence. The claimant filed a video as an exhibit in the trial court showing his route of travel on the paved road; the side roads blocked by gates; the dirt and gravel road he turned into; the signs and how they were hidden by foliage and the like; and finally, the close-to-the-ground cable with which he collided. One thing that the video clearly shows is how the rusty cable, very low to the ground, blended into the background. One could reasonably find that the cable presented a dangerous "trap" for the unwary; that representatives of the State were aware of this trap

and also aware of the fact that there was nothing to clearly indicate that motorized travel was not permitted on this side road; and that, despite this knowledge, the State failed to take reasonable steps to remedy the danger or adequately warn of its presence by clearly prohibiting motorized travel on the road in question or by other means. We believe that reasonable minds could differ as to whether the State's knowledge and conduct or lack of effective action amounted to gross negligence. Hence, we conclude that this issue is one for a trier of fact and not appropriate for disposition by way of summary judgment. We express no opinion on the matter, one way or the other.

VII.

The judgment of the Claims Commission is vacated. We remand to the Claims Commission for further proceedings, consistent with this opinion. Costs on appeal are taxed to the State of Tennessee.

CHARLES D. SUSANO, JR., JUDGE